Supreme Court, U.S.
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No. 02-1423

IN THE

Supreme Court of the United States

BELLSOUTH CORPORATION and
BELLSOUTH TELECOMMUNICATIONS, INC.,

Petitioners,

v.

COVAD COMMUNICATIONS COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

BRAD M. SONNENBERG
MARGARET A. ROBBINS
COVAD COMMUNICATIONS COMPANY
3420 Central Expressway
Santa Clara, CA 95051

TONY G. POWERS
ROGERS & HARDIN LLP
229 Peachtree Street
Atlanta, GA 30303

ALFRED C. PFEIFFER, JR.
Counsel of Record
FRANK M. HINMAN
BINGHAM MCCUTCHEN LLP
Three Embarcadero Center
San Francisco, CA 94111-4067
(415) 393-2000

Counsel for Respondent

180356

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Respondent submits that the following question more accurately reflects the issue presented by the ruling below:

> May a facilities-based competitive local exchange carrier state an antitrust claim under Section 2 of the Sherman Act, 15 U.S.C. § 2, against an incumbent local telephone monopolist based on allegations of exclusionary conduct even if some of that conduct also violates the Telecommunications Act of 1996, 47 U.S.C. §§ 151, *et seq.*?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Covad Communications Company states that it has the following parent corporation:

Covad Communications Group

Covad Communications Group is the only publicly held company that owns 10% or more of Covad Communications Company's stock.

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Respondent Covad Communications Company ("Covad") respectfully requests that the Court grant the Petition for a Writ of Certiorari filed by petitioners BellSouth Corporation and BellSouth Telecommunications, Inc. (collectively "BellSouth") and that the Court deny BellSouth's request to hold this case pending resolution of *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, cert. granted*, 123 S. Ct. 1480 (March 10, 2003) (No. 02-682) ("*Trinko*"). In the alternative, Covad respectfully requests that the Court deny BellSouth's petition in its entirety.

COUNTER-STATEMENT OF THE CASE

A persistent pattern of anticompetitive conduct has hampered the telecommunications industry in its efforts to achieve the goal of increased competition in all markets that Congress sought when it passed the landmark Telecommunications Act of 1996, 47 U.S.C. §§ 151, *et seq.* Incumbent local telephone monopolists including Verizon and BellSouth have manipulated the regulatory and competitive landscapes in order to protect their long-sanctioned, rate-payer funded monopolies over local telephone service. The Second Circuit's decision in *Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.*, 305 F.3d 89 (2d Cir. 2002), *cert. granted, sub nom. Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 123 S. Ct. 1480 (March 10, 2003) (No. 02-682) addresses some of that behavior, albeit in the context of the end-user customers of those companies who compete with Verizon by reselling its local service offerings. The claims raised by *Trinko* are, without a doubt, serious and should be addressed by this Court.

But the incumbent local telephone monopolists have also been engaged in conduct that has more far-reaching, and

ultimately more serious anticompetitive effects than merely retaining their historic, local telephone monopolies. They have manipulated and extended their traditional local service monopolies so as to dominate new, innovative markets, markets that depend on access to the local telephone network in order to provide competing services in downstream markets. They have succeeded dramatically, driving many competitors out of business altogether, and severely limiting consumer choice in such markets, including especially the markets for local Internet access in which Covad competes. That type of effort to extend a monopoly from one market to another is not squarely presented in *Trinko*, but is the very core of Covad's claims against BellSouth, as recently analyzed and approved of by the Eleventh Circuit.

Simply put, *Trinko* is not the proper vehicle by which to resolve the weighty issues Verizon (and the United States, which filed an *amicus curiae* brief in support of Verizon's petition for a writ of certiorari) seek to raise. Verizon criticizes the *Trinko* complaint as too conclusory, but tries to use *Trinko*'s relatively narrow claims to change the antitrust rules governing the entire telecommunications industry — indeed, potentially well beyond that industry.[1] The Court should reject that attempt; if the Court wishes to address the broader issues Verizon and the United States argue, it should consolidate Covad's claims against BellSouth and consider them together with *Trinko*.

Both Covad's claims and those presented in *Trinko* conflict with the Seventh Circuit's decision in *Goldwasser v. Ameritech*, 222 F.3d 390 (7th Cir. 2000), and both deserve

1. The incumbent local telephone monopolists may see a tactical advantage in proceeding in this fashion. While Verizon promptly petitioned for review of the Second Circuit's ruling in *Trinko*, BellSouth, represented by the same law firm, waited until the last possible day to file their petition for review of the Eleventh Circuit's decision.

to be resolved by this Court. But they are not the same claims and, so, each requires consideration. Covad, because it is a facilities-based competitor of BellSouth in a downstream market,[2] as well as BellSouth's direct customer, stands in a different position from an antitrust standpoint than the indirect customers of Verizon who are the plaintiff class in *Trinko*. All such indirect customer claims, in the end, derive from the anticompetitive conduct the incumbent local telephone monopolists have targeted at their direct customer/ competitors, like Covad. Logically, the consumers' derivative claims should not be heard in isolation from the direct competitor claims from which they derive. The Court will best serve the overall public interest, and in particular the overall interests of the telecommunications industry, by considering the claims of Covad together with the indirect customer claims of the *Trinko* plaintiffs.

A. Covad's Complaint and the Relevant Markets[3]

In an effort to make it appear that the Court's ruling in *Trinko* will likely resolve all of Covad's claims, BellSouth

2. A "facilities-based" competitor is one which does not merely obtain from the incumbent provider all needed elements of the services it provides, but makes significant capital investments in its own network elements (though it may still obtain some elements from the incumbent). *See, e.g.*, 47 U.S.C. § 271(c)(1)(A). Covad has invested heavily in its own network facilities designed to provide digital subscriber line ("DSL") service. To use these facilities requires receiving a signal over the ordinary local loops that connect homes and businesses to telephone central offices.

3. Because this case was decided on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the facts must be taken as alleged in Covad's complaint. *Swierkewicz v. Sorema N.A.*, 534 U.S. (Cont'd)

trivializes Covad's allegations and the Eleventh Circuit's ruling by improperly substituting its characterizations for the record. BellSouth argues that Covad's allegations and theories are "indistinguishable" from those presented by the end-user class plaintiffs in *Trinko* and *Goldwasser*. (Pet. 8) But they are not the same; Covad's claims are far more direct and substantial, present issues not present in *Trinko* at all, and overall present a superior vehicle for addressing the issue of the proper role of antitrust enforcement in the deregulated telecommunications industry.

BellSouth distorts the context of Covad's claims at the outset, asserting that Covad's theory is that BellSouth violated the antitrust laws by "failing to carry out with sufficient speed and efficiency its *regulatory obligations*" under the Telecommunications Act of 1996 (the "1996 Act"). (Pet. 2 (emphasis in original)) That is not Covad's claim. Covad is not complaining about mere inefficiency by BellSouth, nor mere regulatory nits. To the contrary, Covad pleaded in great detail an intentional scheme by BellSouth to manipulate its position as the incumbent local telephone monopolist into control over local Internet access markets, and continued dominance over the local telephone service market, by excluding Covad from access to essential elements of BellSouth's local network. The real question presented by this case — but not squarely presented in *Trinko* — is whether a monopolist may evade antitrust liability for that

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(Cont'd)

506, 508 n.1 (2002); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 515-16 (1972). The so-called "facts" asserted in BellSouth's petition, many of which differ from the allegations of Covad's complaint, thus were not considered by the lower courts, are not part of the record in this case, and can provide no basis on which to frame the issues before this Court.

type of classic, exclusionary conduct, merely because that conduct also happens to violate another federal statute, the 1996 Act.

This is not a case about whether BellSouth failed to attend to regulatory technicalities with sufficient dispatch. Taking Covad's allegations as true (which BellSouth fails to do in its statement of the case), BellSouth engaged in egregious exclusionary conduct with no possible legitimate purpose, including: precluding interconnection via false statements that no space was available for collocation of Covad's equipment in central offices, thus foregoing rents it could have earned from that available space (Complaint, ¶¶ 47-49); foreclosing competition through extensive and unjustified delays and conditions even when grudgingly providing collocation, again at the sacrifice of rents Covad was ready and willing to pay (Complaint, ¶¶ 50-60); enacting unexplained and unnecessary changes in its normal business practices designed solely to frustrate Covad's market entry (Complaint, ¶¶ 61-64); refusing to lease loops to Covad — based on BellSouth's decision, contrary to industry standard, that they are "too long" — despite Covad's willingness and ability to pay for and use the otherwise unutilized loops (Complaint, ¶¶ 75-83); and refusing line-sharing so as to raise its rival's costs and implement a price squeeze with regard to the otherwise unused data bandwidth of its local loops (Complaint, ¶¶ 84-90). That conduct served no regulatory purpose, indeed, no purpose at all except to exclude competition.

BellSouth similarly distorts Covad's complaint by misstating Covad's definition of the relevant markets in which the parties compete. Ignoring Covad's complaint, BellSouth suggests that Covad defined the markets as "high-speed Internet access" markets and claims to have no power

in those markets. (Pet. 3, 12) In reality, the relevant markets properly include all means of Internet access; BellSouth dominates those markets, which are highly localized, with a variety of products, including dial-up telephone Internet access, still the predominant means of reaching the Internet. (Complaint, ¶¶ 17-24) BellSouth's attempt to rewrite the market definitions, and to argue that it has no market power (Pet. 12) is just one striking example of its disregard for the procedural posture of this case, which was decided on a Rule 12 motion.

B. Proceedings Below

This case, like *Trinko*, is before the Court as the result of a motion to dismiss brought under Rule 12 of the Federal Rules of Civil Procedure. BellSouth moved to dismiss Covad's claim, in its entirety, claiming Covad's allegations, taken as true, could not state any cognizable claim as a matter of law. The United States District Court for the Northern District of Georgia agreed, and dismissed Covad's claims. The Eleventh Circuit disagreed, and reversed, reinstating Covad's claims. BellSouth misstates the Eleventh Circuit's holding below in at least three important respects.

First, BellSouth asserts that the Eleventh Circuit held that Covad need not prove exclusionary conduct, so long as it pleaded that BellSouth acted with anticompetitive intent. (Pet. 16) BellSouth arrives at this conclusion by ignoring the Eleventh Circuit's true holding, and presuming that it was Covad's duty, in its complaint, to anticipate and refute every purportedly "legitimate" business justification BellSouth might proffer. The Eleventh Circuit, relying on this Court's decision in *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 483-84 (1992), simply

rejected BellSouth's attempt to shift the burden of proof concerning legitimate business justifications for its conduct: "Here, on motion to dismiss, there is no proffered legitimate business justification for Covad to refute, so the absence of specific factual allegation is irrelevant." (Pet. App. A at 23a n.15) That decision was clearly correct, under this Court's consistent precedent — it is not Covad's burden to disprove BellSouth's business justifications before they are offered. As the Court held in *Kodak*, "[i]f Kodak adopted its [challenged] policies as part of a scheme of willful acquisition or maintenance of monopoly power, it will have violated § 2." 504 U.S. at 483 (citations omitted). BellSouth's right to refuse to deal, even with competitors, "is not absolute; it exists only if there are legitimate competitive reasons for the refusal." *Id.* at 483 n.32 (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602-05 (1985)); *accord United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (refusals to deal acceptable only "[i]n the absence of any purpose to create or maintain a monopoly"). BellSouth bears the burden of showing such reasons motivated its conduct. *Nat'l Communications Ass'n, Inc. v. AT&T Corp.*, 238 F.3d 124, 131 (2d Cir. 2001) (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608-09 (1985)); *see also LePage's Inc. v. Minnesota Mining and Mfg. Co.*, __ F.3d __, 2003 WL 1480498, at *20 (3d Cir. Mar. 25, 2003) ("The defendant bears the burden of 'persuad[ing] the jury that its conduct was justified by any normal business purpose'"); *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (*en banc*), *cert. denied*, 534 U.S. 952 (2001) ("if a plaintiff successfully establishes a *prima facie* case under § 2 by demonstrating anticompetitive effect, then the monopolist may proffer a 'pro-competitive justification' for its conduct"). BellSouth cannot support an interpretation of "exclusionary conduct" that shifts that burden to Covad.

Second, BellSouth claims the Eleventh Circuit established "expansive" new parameters for an essential facilities claim. (Pet. 6) In reality, the Eleventh Circuit did not create a new essential facilities standard. It recited the same four-element test that has been recognized by every Circuit: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of use of the facility to a competitor; and (4) the feasibility of providing the facility." (Pet. App. A at 17a) It also directly cited many of those decisions, and pointed out that BellSouth's main response was to criticize the essential facilities doctrine. (Pet. App. A at 18a) The Eleventh Circuit went on to hold that Covad's complaint fully alleged each of those four necessary elements. (Pet. App. A at 20a-21a and Complaint, ¶¶ 16, 25-26, 47-48, 77, 86, 111) Thus, this case is not a doctrinal outlier, it is a paradigm essential facilities claim. It is ideally situated for review at this time, so that the Court may reach the substantive issues raised by Verizon and the United States in *Trinko*. Indeed, as described below, because the complaint in *Trinko* does not as clearly plead an essential facilities theory, this case presents a far superior vehicle for reviewing such claims in the telecommunications industry.

Third, BellSouth suggests that Covad makes essentially the same allegations as the monopoly leveraging claim in *Trinko*. (Pet. 8-9) That is not so. While BellSouth is correct that a number of Courts of Appeal (including the Second and Eleventh Circuits) have held that a plaintiff may state a Section 2 violation by showing a monopolist utilized its monopoly over an upstream market to gain a "competitive advantage" in a downstream market, Covad's claim does not depend on such a rule. First, Covad unambiguously pleaded that BellSouth used its control over the upstream local

telephone network to gain a monopoly (or a dangerous probability of achieving one) in the downstream markets for local Internet access. (Complaint, ¶¶ 114-115, 119) That type of conduct, extending one monopoly to gain another, is accepted even by the Courts of Appeals decisions cited by BellSouth, which do not accept the "competitive advantage" standard. *See Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 548 (9th Cir. 1991); *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 206 (3d Cir. 1992).

Second, in this case the upstream market *is* regulated. Thus, BellSouth's attempt to use its control over the local telephone network, funded for decades by rate-payers captive to a state-granted monopoly, to prevent downstream competition presents the "special problem" long recognized by antitrust law as "posed by a monopolist, regulated at only one level, who seeks to dominate a second, unregulated level, in order to earn at that second level the very profits that the regulation forbids at the first." *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 29 (1st Cir. 1990) (Breyer, J.).

Thus, to the extent that the Second Circuit's decision in *Trinko* is based on a more expansive reading of monopoly leveraging as a Section 2 violation, consolidation of this case with *Trinko* will provide the Court the opportunity to provide greater clarity to the lower courts, and to the telecommunications industry.

REASONS FOR GRANTING THE PETITION

The telecommunications industry has been immersed in uncertainty since the Seventh Circuit's decision in *Goldwasser* three years ago. Across the country, incumbent local monopolists like BellSouth relied on *Goldwasser* to

assert that the 1996 Act absolutely precluded any claim that they had violated the antitrust laws in their interactions with competitors. The district courts were split in their treatment of that defense, though a majority simply followed *Goldwasser* and dismissed competitor's claims.[4] Now, three other Courts of Appeal have considered and rejected *Goldwasser* and have held competitors may state an antitrust claim based on conduct that also implicates the 1996 Act. *Trinko*, 305 F.3d at 108; *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272 (11th Cir. 2002); *MetroNet Servs. Corp. v. US West Communications*, __ F.3d __, No. 01-35406, 2003 WL 1618668 (9th Cir. Mar. 31, 2003). This Court has decided to review one of those decisions, the Second Circuit's ruling in the *Trinko* end-user class action case. 123 S. Ct. 1480 (March 10, 2003).

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4. *See, e.g.*, *Covad Communications Co. v. Bell Atlantic Corp.*, 201 F. Supp. 2d 123 (D.D.C. 2002) (dismissing based on *Goldwasser*); *Cavalier Telephone, LLC v. Verizon Virginia Inc.*, 208 F. Supp. 2d 608 (E.D. Va. 2002) (same); *MGC Communications, Inc. v. BellSouth Telecommunications, Inc.*, 146 F. Supp. 2d 1344 (S.D. Fla. 2001) (same); *Intermedia Communications Inc. v. BellSouth Telecommunications, Inc.*, 173 F. Supp. 2d 1282 (M.D. Fla. Dec. 15, 2000) (same); *Supra Telecommunications & Information Sys., Inc. v. BellSouth Telecommunications, Inc.*, No. 99-1706-SEITZ (S.D. Fla. June 6, 2001) (same); *Building Communications, Inc. v. Ameritech Servs., Inc.*, No. 97-CV-76336, 2001 WL 1525268 (E.D. Mich. June 21, 2001) (same); *see contra Ohio Bell Telephone Co. v. CoreComm Newco, Inc.*, 214 F. Supp. 2d 810 (N.D. Ohio 2002) (permitting Section 2 claim based on 1996 Act violations); *Davis v. Pacific Bell*, 204 F. Supp. 2d 1236 (N.D. Cal. 2002) (same); *Stein v. Pacific Bell*, 173 F. Supp. 2d 975 (N.D. Cal. Feb. 14, 2001) (same); *Electronet Intermedia Consulting, Inc. v. Sprint-Florida, Inc.*, No. 4:00-CV-176-RH (N.D. Fla. Sept. 20, 2000) (same); *MGC Communications Inc. v. Sprint Corp.*, No. CV-S-00-948-PMP (D. Nev. Dec. 12, 2000) (same); *Bell Atlantic Network Servs., Inc. v. Ntegrity Telecontent Servs., Inc.*, Civ. No. 99-5366-AET (D.N.J. Oct. 31, 2000) (same).

The Court should also grant review in this case, and consolidate it with *Trinko* for argument. Covad's case against BellSouth, because it is an action by a direct, facilities-based competitor of an incumbent local telephone monopolist, adds important factual and legal elements missing from *Trinko*. Consideration of Covad's claims at the same time as *Trinko* will best assure that the *Goldwasser*-inspired uncertainty is removed from the telecommunications industry, so that both incumbent monopolists and competitors will know with clarity their rights and obligations under the antitrust laws.

Thus, Covad supports BellSouth's petition, to a point: the Court should grant the petition and consolidate this case with *Trinko* to the extent the Court intends: (1) to determine the interplay of the 1996 Act and the Sherman Act; and/or (2) more generally to determine the proper parameters of Section 2 claims in the telecommunications industry (as requested by both Verizon and the United States). There is, however, no reason to hold BellSouth's petition pending resolution of *Trinko*. If the Court wishes to reach the merits of the *Goldwasser*-related arguments, consolidating this case with *Trinko* will advance that goal. If the Court is not going to reach the antitrust merits of *Trinko*, it should simply deny BellSouth's petition altogether, and permit Covad to proceed with its claims against BellSouth without further delay. There is no benefit to anyone in merely holding BellSouth's petition.

A. Covad Is A Direct Customer and Competitor With No Standing Issues

The status of the plaintiffs is a key distinction between Covad's claims and those presented in *Trinko*. The putative class in *Trinko* consists entirely of indirect customers of the incumbent monopolist, Verizon — that is, customers who succeeded in obtaining local telephone service from one of Verizon's competitors. *Trinko*, 305 F.3d at 92 ("a class consisting of customers who received local phone service in the region served by Bell Atlantic from a company other than Bell Atlantic"). The plaintiffs' claimed injury is that because Verizon did not "provide equal access" to its local telephony reseller competitors, the plaintiffs "received poor local phone service." *Trinko*, 305 F.3d at 95. As a result, Verizon has argued and continues to argue before this Court that the plaintiff class members have suffered at most "indirect" harm and so lack standing to pursue antitrust claims against Verizon. (*See* Petition for a Writ of Certiorari, No. 02-682 ("*Trinko* Pet.") at 24 ("the alleged injury here should have been barred as indirect, deriving from harm to the direct customer"))

Covad does not ascribe any merit to Verizon's standing argument. But as BellSouth recognizes (Pet. 9-10) the mere existence of that standing challenge creates a substantial risk that the Court could resolve *Trinko* without resolving the antitrust merits. If the Court determined the *Trinko* class plaintiffs lacked standing, it would have no reason to proceed further and reach the important issues framed by both Verizon and BellSouth in their respective petitions. *See, e.g.*, *Steel Co. v. Citizens For A Better Env't*, 523 U.S. 83, 110 (1998) (declining to review merits having found no standing: "However desirable prompt resolution of the merits EPCRA

question may be, it is not as important as observing the constitutional limits set upon courts in our system of separated powers."). If the Court consolidates Covad's claims with *Trinko*, it will eliminate that risk. As BellSouth noted, "Covad is a competitor of BellSouth, and not a competitor's customer, and the merits issues are squarely presented." (Pet. 10) BellSouth has not raised any challenge to Covad's standing, so its claims would be decided solely on the merits "squarely framed" by its complaint.

B. Covad Is A Facilities-Based Competitor, Not A Reseller

Even in the absence of any standing issues, the Court should consolidate Covad's claims for review together with *Trinko*. Even if the plaintiff in *Trinko* had been AT&T, the competitive local carrier that dealt directly with Verizon, rather than a group of AT&T's customers, Covad's claims would still more squarely frame the issues Verizon, BellSouth and the United States seek to have this Court address. Because Covad is a facilities-based DSL provider, rather than a local telephony reseller like AT&T, it presents stronger and clearer claims of denial of essential facilities and extension of a monopoly into a second market. Consolidation of Covad's claims for consideration now will ensure that the Court's decision provides greater clarity to a broader spectrum of telecommunications providers.[5]

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5. Covad does not suggest that resellers cannot state viable Section 2 claims based on exclusionary conduct by incumbent local telephone monopolists. To the contrary, resellers may be able to show that the monopolists have extended their monopolies from one market to another, and may be able to show that they have been denied access to essential facilities. But all facilities-based competitors who have been excluded from competing in downstream markets will directly and necessarily present such claims.

1. Covad pleads extension of a monopoly into a second market

As the Eleventh Circuit recognized, from an analytical perspective, all of Covad's Section 2 claims may be characterized as one means or another of extending a monopoly into a second market. (Pet. App. A at 16a) That is because Covad is both a competitor and customer of BellSouth, a vertically integrated monopolist. As in the seminal Section 2 "price squeeze" case of *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945) ("*Alcoa*"), Covad buys essential inputs from a monopolist in an upstream market, and uses those inputs to compete with that vertically integrated monopolist in a separate, downstream market. Here, the upstream market is the local telephone network, completely dominated by BellSouth. Covad is not seeking simply to take that network and resell it, however. Instead, just as the competitors in *Alcoa* purchased aluminum ingots to make aluminum sheet, Covad leases elements of BellSouth's network, combines them with its own facilities, and produces a new service, DSL, which competes with BellSouth in another market, the market for local Internet access. *Compare Alcoa*, 148 F.2d at 437-38, *with* Complaint, ¶¶ 25-26, 91.

BellSouth attempts to minimize the significance of Covad's claim that BellSouth has used its monopoly in one market to create a monopoly in another by suggesting Covad is merely asserting the same theory advanced in *Trinko*. BellSouth implies that the Eleventh Circuit accepted a Covad theory that BellSouth violated Section 2 by merely attempting to use its upstream monopoly power to gain some advantage — though short of a monopoly or even an attempt at one — in the downstream local Internet access markets. That is not

what Covad alleged, nor is it what the Eleventh Circuit held. Covad's monopolization claim expressly alleged that BellSouth used its power over the local telephone network to "maintain and extend" the monopoly power it already possesses in the local Internet access markets. (Complaint, ¶¶ 114-15) Covad's attempted monopolization claim alleged that BellSouth has "demonstrated a dangerous probability of success in its efforts to gain, perpetuate or enhance" a monopoly in those local Internet access markets. (Complaint, ¶¶ 118-19) In short, Covad's Section 2 claims do not invoke, much less depend upon, the "competitive advantage" theory BellSouth disparages in its petition.

The Eleventh Circuit clearly understood Covad's allegations, and did not analyze Covad's claims under the lower threshold "competitive advantage" monopoly leveraging standard. To the contrary, it relied upon this Court's ruling in *Kodak* that a Section 2 claim may exist "where a defendant used its control over one market *to gain dominance* in another market." (Pet. App. A at 16a (emphasis added); *see also* Pet. App. A at 24a ("a vertically integrated monopolist that refuses to deal with a customer *to foreclose competition* in a second market may violate Section 2") (emphasis added)).

The Eleventh Circuit's analysis is thus different from the Second Circuit's monopoly leveraging analysis in *Trinko*, which without detailed discussion unambiguously adopted the more permissive "competitive advantage" standard. *Trinko*, 305 F.3d at 108.[6] If the Court were to resolve the

6. As a starting point, it is not clear the plaintiffs in *Trinko* pleaded a monopoly leveraging theory. As the District Court decision in this case noted, claims by local telephone resellers' customers arguably do (Cont'd)

merits of *Trinko*'s monopoly leveraging claim on the basis of the "competitive advantage" standard alone, it could allow incumbent local monopolists to continue to frustrate competition while arguing that well-accepted monopoly-to-monopoly claims such as Covad's are invalid in this industry. The Court should consolidate Covad's claims with *Trinko* to avoid the necessity of piecemeal rulings concerning the parameters of monopoly conduct in the telecommunications industry. Consolidation will allow the Court to examine both "competitive advantage" and monopoly-to-monopoly claims at the same time, in the same industry.

2. Covad presents a paradigm essential facilities claim

Covad also presents an essential facilities claim distinct from the claims asserted in *Trinko*, which provides an additional reason to grant BellSouth's petition and consolidate the two cases.

BellSouth and Verizon criticize the essential facilities doctrine at length (*See, e.g.*, Pet. 13-15; *Trinko* Pet. 16-18) but cannot dispute that all twelve Courts of Appeal recognize the doctrine, and agree as to its elements.[7] The United States

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(Cont'd)

not involve "a secondary market" so as to implicate leveraging theory at all. (Pet. App. B at 55a) Rather, *Trinko*, like *Goldwasser*, simply involved a claim of monopolization of a single market, the local telephone service market. *Id.* Even if *Trinko* invokes monopoly leveraging, however, it is clearly a different species than Covad's theory in this case, as the Eleventh Circuit's analysis confirms.

7. *See, e.g., Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); *Interface Group, Inc. v.*

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described the principle behind "the leading case," the Seventh Circuit's decision in *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir. 1983): "a monopolist may be required to assist rivals by sharing a facility if the monopolist can 'extend monopoly power from one stage of production to another.'" (Brief For The United States And The Federal Trade Commission As Amici Curiae, No. 02-682 ("*Trinko* Amicus Brief") at 12)[8]

Covad's essential facilities claim fits perfectly the *MCI* essential facilities test and presents the doctrine for review

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Massachusetts Port Auth., 816 F.2d 9, 12 (1st Cir. 1987); *Delaware & Hudson Ry. Co. v. Consol. Rail Corp.*, 902 F.2d 174, 179 (2d Cir. 1990), *cert. denied*, 500 U.S. 928 (1991); *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996); *Advanced Health-Care Servs. v. Radford Cmty. Hosp.*, 910 F.2d 139, 150 (4th Cir. 1990); *Mid-Texas Communications Sys., Inc. v. AT&T Co.*, 615 F.2d 1372, 1387 n.12 (5th Cir. 1980); *Directory Sales Mgt. Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 612 (6th Cir. 1987); *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir. 1983); *City of Malden v. Union Elec. Co.*, 887 F.2d 157, 160 (8th Cir. 1989); *Vernon v. Southern California Edison Co.*, 955 F.2d 1361, 1366-67 (9th Cir. 1992), *cert. denied*, 506 U.S. 908 (1992); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1520 (10th Cir. 1984), *aff'd on other grounds*, 472 U.S. 585 (1985); *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272, 1285-88 (11th Cir. 2002); *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1356-57 (Fed. Cir. 1999).

8. Covad's claims are even stronger than the type of claim the United States cites, because Covad is not seeking "assistance" from its rival, nor to "share" anything with BellSouth. Rather, BellSouth is refusing to lease to Covad elements of its network that by definition it is not otherwise using, and from which it is not otherwise deriving the income Covad would provide.

more squarely than the complaint in *Trinko* does. *MCI* distinguished between two sets of demands for network access by MCI. The Seventh Circuit found MCI stated an essential facilities claim when it sought access to elements of AT&T's monopoly local telephone network that could not reasonably be duplicated, in order to use those elements to provide a separate and distinct product, long distance service. *MCI*, 708 F.2d at 1132-33. By contrast, the Seventh Circuit found MCI could not state a claim when it sought access to elements of AT&T's long distance network, in part because MCI could not show the elements it sought to lease were essential (MCI having shown the ability to duplicate them), 708 F.2d at 1148, and, given the elements were not essential, MCI could not claim a right to unfettered access to AT&T entire network merely to provide the same service AT&T was providing. *MCI*, 708 F.2d at 1149.

Verizon has focused on the latter component of the Seventh Circuit's analysis in isolation, to argue that there can be no essential facilities claim when the competitor merely provides the same service as the incumbent whose facilities it seeks to share. (*Trinko* Pet. 12 n.6 (referring to "the *rejected* (same-level, same-market) claim in *MCI*") (emphasis in original)) But that is not what *MCI* held, nor would it be a coherent result; if a plaintiff meets the four well-established elements of the essential facilities doctrine, there is no reason to import a new unspoken element that the competitor must participate at a different level of the market than the monopolist. But were the Court to accept Verizon's interpretation of *MCI*, the Court could resolve the essential facilities claim on very narrow grounds applicable only to local service reseller competitors (those who participate, in Verizon's words, at the "same-market, same-level"). Such a ruling would provide no guidance for situations like Covad's, where the facility is essential to competition in a separate, downstream market.

Verizon also attacks the *Trinko* plaintiffs' essential facilities claim on the grounds that it does not claim a "*denial* of access or cessation of competition" but only challenges "the *terms* of access." (*Trinko* Pet. 13 (emphasis in original)) Again, Covad disagrees with Verizon's apparent formulation of the essential facilities doctrine. The lower courts have consistently recognized that the refusal to share an essential facility except on terms that are commercially unreasonable is equivalent to an outright denial of the facility, and suffices to state a claim. In the "leading case," for example, the Seventh Circuit found that "inappropriate or inefficient interconnections" sufficed to support a Section 2 violation. *MCI*, 708 F.2d at 1150-53; *see also* Pet. App. A at 19a-20a (citing cases from other Courts of Appeal holding that "Section 2 prohibits denial of access to essential facilities *on reasonable terms*") (emphasis in original). But Verizon's position again demonstrates the benefits of consolidating Covad's claims for consideration together with *Trinko*. While the *Trinko* complaint may be unclear on the subject of whether the denial of the essential facility was direct or merely constructive, there is no such doubt in Covad's complaint. Contrary to BellSouth's suggestion, as the Eleventh Circuit held, Covad has explicitly pleaded both forms of denial. (Pet. App. A at 20a-21a (Covad's "complaint does allege that BellSouth sometimes *denied access to its facilities outright* and other times denied access on reasonable terms") (emphasis added)) Thus, to the extent the Court determines that an outright denial of access is required to state an essential facilities claim, Covad's complaint more squarely presents an essential facilities claim for review.

3. Covad's price squeeze claim raises distinct and important issues

Covad's status as a facilities-based downstream competitor also creates an important distinction that affects the impact of regulation on Section 2 claims in the telecommunications industry — it gives rise to a price squeeze claim that the *Trinko* plaintiffs do not present. The Court should consolidate Covad's claims for consideration with *Trinko* to provide more complete guidance to telecommunications industry participants concerning their respective rights and obligations under Section 2.[9]

Ironically, though *Trinko* presents no price squeeze claim, Verizon relies heavily on the First Circuit's decision in *Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990), a price squeeze case. Verizon argues that *Town of Concord* stands for the proposition that the Court should determine, on a Rule 12 record, whether the *Trinko* plaintiffs seek to impose access obligations that would "*undermine* the goal of spurring *independent* investment." (*Trinko* Pet. 19-20 and 3 n.1 (emphasis in original)) Covad disagrees that this is an analysis that can be undertaken at the Rule 12 stage. It is clear that it is the "antitrust court" that "must consider the peculiarities of an industry as recognized in a regulatory statute," *Phonetele, Inc. v. AT&T*, 664 F.2d 716, 742 (9th Cir. 1981) (Kennedy, J.), rather than simply deferring any such analysis to the regulatory administrators as Verizon

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9. BellSouth incorrectly criticizes the Eleventh Circuit's price squeeze ruling as "inconsistent with this Court's precedents." (Pet. 16) BellSouth cites no price squeeze ruling by this Court to support that assertion. But it demonstrates the need for the Court to bring clarity to this issue, which potentially affects all facilities based downstream competitors of incumbent local telephone monopolists.

suggests. (*Trinko* Pet. 21) And when the courts undertake that analysis, they must do so on an adequate factual record, not merely the incumbent local telephone monopolist's say so. But again, were the Court to accept Verizon's argument, the distinction between *Trinko* and Covad's claims is significant. Covad does not present the type of "same-market, same-level" claim disparaged by Verizon in *Trinko*. Rather, Covad buys inputs from BellSouth at regulated prices, then uses them to compete with a separate BellSouth product whose price is unregulated. This court has long recognized the anticompetitive incentives that type of market structure creates:

> In a regulated industry a firm with market power may be unable to extract a super-competitive profit because it lacks control over the prices it charges for regulated products or services. Tying may then be used to extract that profit from sale of the unregulated tied products or services.

Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 36 n.4 (1984) (citation omitted). That rationale has been applied expressly to price squeeze allegations; *Town of Concord* recognized "that a special problem is posed by a monopolist, regulated at only one level, who seeks to dominate a second, unregulated level, in order to earn at that second level the very profits that regulation forbids at the first." 915 F.2d at 29.

BellSouth's petition avoids dealing with the problem of its recognized economic incentive to engage in a price squeeze by mischaracterizing Covad's theory as a predatory pricing claim. Covad does not and need not assert a predatory pricing claim, as BellSouth assumes. (Pet. 17) This has been well-recognized since at least the time of *Alcoa*, which

involved no allegation of pricing below cost, but required only a showing that: (1) a firm has monopoly power over a product; (2) its price for that product is "higher than a 'fair price;'" (3) that product is required to compete in a second market where the monopolist itself competes; and (4) the monopolist's price in the second market is so low relative to the price in the first market that competitors cannot match it and still earn a "living profit." *Alcoa*, 148 F.2d at 437-38. The courts have expressly held that the monopolist's wholesale and retail prices may both be profitable, yet still result in an unlawful price squeeze. *See, e.g., City of Batavia v. FERC*, 672 F.2d 64, 90 (D.C. Cir. 1982); *Ray v. Indiana & Mich. Elec. Co.*, 606 F. Supp. 757, 776 (N.D. Ind. 1984), *aff'd*, 758 F.2d 1148 (7th Cir. 1985). In fact, the real evil of a price squeeze comes not from the level of the retail price in isolation, but because the wholesale price is set artificially high, and operates as a mechanism by which to raise rivals costs — a recognized form of anticompetitive conduct. *See* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L. J. 209, 235-62 (1986). Allegations of raising rivals' cost "qualify as anticompetitive conduct" unless there is a "legitimate business justification for it." *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1553 n.12 (10th Cir. 1995); *see also* Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 318-23 (2001) (discussing economic logic behind raising rivals' cost theory).

Thus, Covad's price squeeze claim presents, as BellSouth concedes, important questions concerning the impact of regulation on antitrust claims in the telecommunications industry. Those questions are different from and more

comprehensive than the issues presented in *Trinko*. To the extent the Court is going to consider the impact of 1996 Act regulation on Section 2 claims, it should consolidate Covad's claims for consideration with *Trinko*.

C. Covad's Detailed Complaint Will Assist The Court

Finally, consolidating Covad's case with *Trinko* will also help eliminate any risk that the Court's decision might turn in any way on perceived deficiencies in the pleadings. While Verizon has criticized the *Trinko* complaint for a perceived lack of detail, *see Trinko* Petition at 5 ("the complaint contained no specifics"), BellSouth — represented by the same lawyers as Verizon — concedes Covad's complaint is quite detailed. (Pet. 18 (complaining of "Covad's 240-paragraph complaint")) Because this case is being reviewed at the Rule 12 stage, the Court is already disadvantaged by the absence of a full factual record. To the extent the Court nonetheless wishes to reach the significant antitrust issues proffered by the United States and the incumbent local telephone monopolists, it should do so on the fullest factual record available: Covad's complaint.

REASONS FOR DENYING THE REQUEST TO HOLD THIS CASE

Whatever the scope of the Court's review of *Trinko*, there is no reason to accept BellSouth's request to hold this case until after *Trinko* is resolved.

If the Court is going to address the core antitrust issues as suggested by Verizon and the United States, it should address those issues in a manner that will provide guidance to as broad a sector of the telecommunications industry as

possible, and on allegations that squarely raise those issues. *Goldwasser* and its progeny have sowed uncertainty throughout the industry. The Court can most adequately provide much needed guidance concerning the issues raised by *Goldwasser* by addressing this case at the same time it considers *Trinko*. This case raises those issues even more squarely and will help bring clarity to a broader sector of the telecommunications industry. There is no benefit to holding this case while industry-wide issues are resolved.

There is also no purpose to holding this case if the Court is going to decide *Trinko* on more narrow grounds than those suggested by the United States, for example, the indirect purchaser standing issue raised by Verizon. Covad has already waited years to have its claims heard. Holding Covad's claims at a standstill serves no purpose but further delay. That delay will be highly prejudicial to Covad's claims, as the Court has noted in the analogous statute of limitations context. *See, e.g., Wilson v. Garcia*, 471 U.S. 261, 271 (1985) ("Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost.") Here, Covad has been forced to wait years, without the ability to conduct even the most rudimentary discovery. All the while, memories fade and witnesses move on with their lives, imperiling Covad's ability to prove its case. *See, e.g., Job Ax Swings At BellSouth*, ATLANTA JOURNAL-CONSTITUTION, March 18, 2003, at D1.

Finally, whether the Court reviews *Trinko* broadly or narrowly, it will not address all of the important antitrust issues raised by Covad. Because Covad is not a reseller like AT&T, it raises claims of denial of essential facilities and extension of monopoly to other downstream markets that differ substantially from the claims raised in *Trinko*, much

as BellSouth tries to blur the distinctions. Covad also raises a price squeeze claim that is not in any way comparable to the claims raised in *Trinko*. There is no reason to delay resolution of Covad's claims to await the outcome of the very different claims at issue in *Trinko*.

If the Court is not going to reach the facilities-based competitor issues squarely framed by Covad's complaint, it should deny outright, not hold, BellSouth's petition.

Respectfully submitted,

BRAD M. SONNENBERG
MARGARET A. ROBBINS
COVAD COMMUNICATIONS COMPANY
3420 Central Expressway
Santa Clara, CA 95051

TONY G. POWERS
ROGERS & HARDIN LLP
229 Peachtree Street
Atlanta, GA 30303

ALFRED C. PFEIFFER, JR.
Counsel of Record
FRANK M. HINMAN
BINGHAM MCCUTCHEN LLP
Three Embarcadero Center
San Francisco, CA 94111-4067
(415) 393-2000

Counsel for Respondent